BEST AVAILABLE COPY

QUESTION PRESENTED

1. Is certiorari appropriate in light of this Court's grant of certiorari in Sandoval v. California, 92-9049, where petitioner failed to preserve the issue presented in Sandoval by presenting the claim to the California Supreme Court?

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NO. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION TO SUPPLEMENTAL PETITION

OPINION BELOW

Petitioner, Paul Palalaua Tuilaepa, in forma pauperis, seeks review of the California Supreme Court's decision affirming his conviction and judgment of death in an opinion published as People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A copy of the opinion was attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has relied upon the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, pertinent

parts of which were set forth at page 2 of his Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the 1978 California Death Penalty Law following a jury trial in which he was convicted of first degree murder, six counts of robbery, one count of attempted robbery, and two counts of assault with a firearm, and in which the jury found true a special circumstance allegation[1/] that the murder occurred during the commission of a robbery. Cal. Penal Code 190.2(a)(17)(i). On automatic appeal, the California Supreme Court affirmed the judgment and the penalty in its entirety. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.

Petitioner filed a Petition for Writ of Certiorari in the present case on July 8, 1993, and respondent filed a Brief in Opposition on September 3, 1993. Petitioner has filed a Supplemental Petition for Writ of Certiorari in light of this Court's grant of certiorari in Sandoval v. California, 92-9049, on September 28, 1993.

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1. A California defendant is not death-eligible absent a finding by the jury or trial judge, where a jury is waived, of one of a number of enumerated "special circumstances" listed in California Penal Code § 190.2.

SUMMARY OF REASONS WHY THE SUPPLEMENTAL PETITION SHOULD BE DENIED

Petitioner failed to preserve his claim that the State of California's reasonable doubt instruction, CALJIC No. 2.90, was unconstitutional by presenting this claim to the California Supreme Court.

ARGUMENT

I

PETITIONER'S ASSERTION THAT THE JURY WAS IMPROPERLY INSTRUCTED ON REASONABLE DOUBT IS NOT PROPERLY BEFORE THE COURT AND MUST BE REJECTED BECAUSE PETITIONER DID NOT PRESENT THE CLAIM TO THE CALIFORNIA SUPREME COURT

Noting that this Court granted certiorari in Sandoval v. California, 92-9049, and in Victor v. Nebraska, 92-8894, on September 28, 1993, on the issue of these states' reasonable doubt instructions, petitioner has filed a Supplemental Petition for Writ of Certiorari. Petitioner urges this Court to grant his supplemental petition on the basis of this "new intervening matter." He points out that the jury in the present case, like the jury in Sandoval v. California, was instructed pursuant to CALJIC No. 2.90, and asserts that this Court should therefore grant certiorari to consider his contention as well. Supplemental Petition at 1-3.

Petitioner's contention is without merit. Petitioner's contention suffers from the critical flaw that he failed to present the claim to the California Supreme Court. Petitioner did not assert, either on appeal or in his petition for writ of habeas corpus, that the jury in the present case was improperly instructed on reasonable doubt. Under well-settled case authority his present contention is not properly before the Court. Illinois v. Gates, 462 U.S. 213, 217 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 181, n.3 (1983); Hill v. California, 401 U.S. 797,

805 (1971); Beck v. Washington, 369 U.S. 541, 553 (1962). Unlike the circumstances in Sandoval v. California, 92-9049, in which the California Supreme Court was presented with and actually considered the reasonable doubt instruction at issue, People v. Sandoval, 4 Cal. 4th 155, 841 P.2d 862, 14 Cal. Rptr. 2d 342 (1992), petitioner's contention was neither presented to nor decided by the California Supreme Court. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). His Supplemental Petition for Writ of Certiorari therefore cannot be entertained by this Court.

CONCLUSION

Petitioner's contention, not having been presented to or considered by the California Supreme Court, is not properly before this Court. His Supplemental Petition therefore should be denied.

Dated: October 29, 1993.

Respectfully submitted,

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September 14, 1993

William K. Suter
Clerk of the Supreme Court
Supreme Court of the United States
Washington, D.C. 20543

RE: Paul P. Tuilaepa v. State of California
Court No. 93-5131

Dear Mr. Suter:

Enclosed are the original and 40 copies of the Brief of Respondent in Opposition to Supplemental Petition for Writ of Certiorari in the above-entitled matter.

Also enclosed is a copy of this letter and a copy of the cover of the brief. Would you please stamp these copies in your usual manner to show that the above documents were received in your office and return them to the undersigned deputy attorney general in the metered, self-addressed envelope. Thank you.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Shirley A. Callin per

PATRICK T. BROOKS
Deputy Attorney General

PTB:sac
Enclosures

NO. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PROOF OF SERVICE UNDER RULE 29.5 (C)

I F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013;

I served one copy of the BRIEF OF RESPONDENT IN OPPOSITION TO SUPPLEMENTAL PETITION in the above entitled case on each of the following persons:

Howard W. Gillingham
Attorney at Law
4370 Tujunga Avenue, Suite 105
North Hollywood, California 91604
(818) 763-4775
[Counsel of Record for P. Tuilaepa]

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on NOV 0 1 1993, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served;

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOV 0 1 1993, at Los Angeles, California.

F. Mitchell
Declarant

F. MITCHELL